

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE,  
WENDY HARRIS, DAVID STALHEIM, AND  
FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

**Case No. 12-2-0013**

**SECOND ORDER ON COMPLIANCE**

THIS MATTER came before the Board at a compliance hearing held April 1, 2014, following submittal of Whatcom County's (County) Compliance Report or Request for Stay of Compliance Schedule, filed February 28, 2014. The Compliance Report described the County's response to the Board's June 7, 2013, Final Decision and Order. Petitioners Hirst, et al. and Futurewise filed an Objection to a Finding of Compliance on March 10, 2014. On April 1, 2014, a Compliance Hearing was held telephonically and was attended by Board members Nina Carter, Raymond Paoella, and Margaret Pageler with Ms. Carter presiding. Petitioners Hirst, et al. and Futurewise were represented by Jean O. Melious and Tim Trohimovich. Whatcom County appeared through its attorney Karen Frakes.

**I. SYNOPSIS OF DECISION**

The Board found the County did not comply with the Growth Management Act. It found continuing non-compliance and imposed an extended compliance schedule in view of the complexity of the issues and the pendency of proceedings before the Court of Appeals. A Board letter of continuing non-compliance was sent to the Governor in accordance with RCW 36.70A.330(3).

## II. PROCEDURAL HISTORY

On June 7, 2013, the Board found Whatcom County's Ordinance 2012-032 did not comply with RCW 36.70A.070(5) because the County failed to include measures governing rural development in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife.<sup>1</sup> This Order established a compliance deadline of December 4, 2013, and set a compliance hearing for January 21, 2014. In November and December 2013, the County and Petitioners submitted motions requesting a compliance date extension, supplementation of the record, and a petition to impose invalidity. Following a December 18, 2013, Compliance Hearing, the Board found the County had not taken action to comply with the Growth Management Act, and thus, found the County in continuing non-compliance and extended the compliance schedule.<sup>2</sup> The Board also denied Petitioners' request for invalidity because the Board cannot impose invalidity on **pre-existing** regulations not challenged within 60 days of original adoption.<sup>3</sup>

## III. BURDEN OF PROOF

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.<sup>4</sup> After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.<sup>5</sup> For purposes of Board review of the comprehensive

<sup>1</sup> *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order (FDO) (June 7, 2013) at 12 and 37- 42.

<sup>2</sup> *Hirst v. Whatcom County*, Case No. 12-2-0013, Compliance Order (January 10, 2014) at 2-8 and 9.

<sup>3</sup> GMHB Case No. 12-2-0013 Compliance Order (January 10, 2014) at 5: "From the evidence in the record, the Board found and concluded the County's Comprehensive Plan did not comply with RCW 36.70A.070(5) because the County failed to include measures in the rural element of its comprehensive plan protecting surface and groundwater quality, water availability, and water for fish and wildlife. The County must comply by strengthening its plan and development regulations to protect water quality, the supply of water resources, and conserving fish and wildlife habitat; **but the Board cannot impose invalidity on pre-existing development regulations. The Board's authority to invalidate adopted plans and regulations is strictly limited by statute ( RCW 36.70A.302.)** Previously enacted regulations not challenged within sixty days are not within the Board's reach **but, if they are deficient, they do not constitute the measures** required by RCW 36.70A.070 (5)(c)(iv)." (emphasis added)

<sup>4</sup> RCW 36.70A.300(3)(b).

<sup>5</sup> RCW 36.70A.330(1) and (2).

1 plans and development regulations adopted by local governments in response to a non-  
2 compliance finding, the presumption of validity applies and the burden is on the challenger  
3 to establish that the new adoption is clearly erroneous in view of the entire record before the  
4 board and in light of the goals and requirements of the GMA.<sup>6</sup>

5 In order to find the County's action clearly erroneous, the Board must be "left with the  
6 firm and definite conviction that a mistake has been made."<sup>7</sup> Within the framework of state  
7 goals and requirements, the Board must grant deference to local governments in how they  
8 plan for growth.<sup>8</sup> In sum, during compliance proceedings the burden remains on the  
9 Petitioner to overcome the presumption of validity and demonstrate that **any action** taken  
10 by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A  
11 RCW (the Growth Management Act).<sup>9</sup> Where not clearly erroneous and thus within the  
12 framework of state goals and requirements, the planning choices of the local government  
13 must be granted deference.  
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#### 16 IV. POSITIONS OF THE PARTIES

17 In the Board's FDO, it found the County's Rural Element, as amended by Ordinance  
18 No. 2012-032 and Policy 2DD-2.C, "does not include the measures needed to protect rural  
19 character in the County's Rural Area by ensuring patterns of land use and development  
20 consistent with water resource protection" as required by RCW 36.70A.070(5)(c)(iv). The  
21 County's policies incorporating existing regulations failed to protect rural character because  
22 the particular regulations either applied only to limited areas of the County and did not apply  
23 to the entire Rural Area or were limited to subdivisions of land rather than all rural  
24 development.<sup>10</sup>  
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27 In the County's Compliance Report and during the Compliance Hearing, the County  
28 clarified that it had appealed the Board's FDO to the Court of Appeals Division I. However,  
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30 <sup>6</sup> RCW 36.70A.320(1), (2), and (3).

31 <sup>7</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

32 <sup>8</sup> RCW 36.70A.3201.

<sup>9</sup> RCW 36.70A.320(2).

<sup>10</sup> GMHB Case No. 12-2-0013, Final Decision and Order (June 7, 2013) at 44, following discussion and analysis at 20-44.

1 on January 28, 2014, the County adopted Ordinance 2014-002 amending various land use  
2 provisions in its Comprehensive Plan to cross-reference to existing Whatcom County Codes  
3 related to water resources. In its compliance report and at the compliance hearing, the  
4 County recognized that the Board might not find the County in compliance, and thus,  
5 requested a stay of the compliance proceedings or an extension of the compliance actions  
6 until the Court of Appeals issues a ruling.<sup>11</sup>  
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8 Petitioners objected to the County's compliance efforts by pointing out that Ordinance  
9 2014-002 did not change the Comprehensive Plan or development regulations to meet the  
10 GMA's requirements in the June 7, 2013, FDO. Petitioners cite a memorandum from the  
11 County's Long Range Planning Manager which contains the sentence: "No changes to  
12 existing regulations are being proposed."<sup>12</sup> Rather than addressing the non-compliant  
13 provisions, the County made "five minor amendments to its rural element" which addressed  
14 a limited area of the County instead of the entire Rural Area.<sup>13</sup> Petitioners then elaborate on  
15 why each amendment in Ordinance 2014-002 does not meet the FDO requirements.<sup>14</sup>  
16 Petitioners objected to the County's request for a stay of the compliance proceedings  
17 because their request violated the Board's rules of practice in WAC 242-03-860. Petitioners  
18 requested the Board deny the County's stay request.<sup>15</sup> Finally, Petitioners requested the  
19 Board impose invalidity on specific County policies which if left in effect would substantially  
20 interfere with the fulfillment of the goals of GMA.<sup>16</sup>  
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## 23 V. BOARD DISCUSSION AND ANALYSIS

### 24 Relevant Authorities

25 **RCW 36.70A.300** Final orders.

26 (3) In the final order, the board shall either:  
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30 <sup>11</sup> County Compliance Report (February 28, 2014) at 1.

31 <sup>12</sup> Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 1.

32 <sup>13</sup> *Id.* at 6-13.

<sup>14</sup> County Compliance Report (February 28, 2014), Ex. R-166.

<sup>15</sup> Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 14.

<sup>16</sup> During the compliance hearing, Futurewise referred to Policies 2DD-2.C.8 & Policy 2DD-2.C.9 as those policies that should be declared invalid.

1 (a) Find that the state agency, county, or city is in compliance with the  
2 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption  
3 or amendment of shoreline master programs, or chapter 43.21C RCW as it  
4 relates to adoption of plans, development regulations, and amendments  
thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

5 (b) Find that the state agency, county, or city is not in compliance with the  
6 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption  
7 or amendment of shoreline master programs, or chapter 43.21C RCW as it  
8 relates to adoption of plans, development regulations, and amendments  
9 thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the  
10 board shall remand the matter to the affected state agency, county, or city.  
11 The board shall specify a reasonable time not in excess of one hundred  
12 eighty days, or such longer period as determined by the board in cases of  
13 unusual scope or complexity, within which the state agency, county, or city  
shall comply with the requirements of this chapter. The board may require  
periodic reports to the board on the progress the jurisdiction is making  
towards compliance

14 **RCW 36.70A.302** Growth management hearings board — Determination of  
15 invalidity — Vesting of development permits — Interim controls.

16  
17 (1) The board may determine that part or all of a comprehensive plan or  
18 development regulations are invalid if the board:

19 (a) Makes a finding of noncompliance and issues an order of remand  
under RCW 36.70A.300;

20 (b) Includes in the final order a determination, supported by findings of  
21 fact and conclusions of law, that the continued validity of part or parts of the  
22 plan or regulation would substantially interfere with the fulfillment of the goals  
of this chapter; and

23 (c) Specifies in the final order the particular part or parts of the plan or  
24 regulation that are determined to be invalid, and the reasons for their  
25 invalidity.

26 **WAC 242-03-860** Stay.

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28 The presiding officer pursuant to RCW 34.05.467 or the board pursuant to  
29 RCW 34.05.550(1) may stay the effectiveness of a final order upon motion  
for stay filed within ten days of filing an appeal to a reviewing court.

30 A stay may be granted if the presiding officer or board finds:

31 (1) An appeal is pending in court, the outcome of which may render the case  
32 moot; and

(2) Delay in application of the board's order will not substantially harm the  
interest of other parties to the proceedings; and

1 (3)(a) Delay in application of the board's order is not likely to result in actions  
2 that substantially interfere with the goals of the GMA, including the goals and  
3 policies of the Shoreline Management Act; or

4 (b) The parties have agreed to halt implementation of the noncompliant  
5 ordinance and undertake no irreversible actions regarding the subject matter  
6 of the case during the pendency of the stay; and

7 (4) Delay in application of the board's order furthers the orderly  
8 administration of justice.

9 The board's order granting a stay will contain appropriate findings and  
10 conditions. A board order denying stay is not subject to judicial review.

11 During the compliance hearing, the County stated that while it did take legislative  
12 action, it is not claiming it is or is not in compliance with GMA. The County appealed the  
13 Board's June 7, 2013, FDO to the Court of Appeals and seeks the Court's decision on the  
14 County's status regarding GMA compliance. Thus, the County requested a stay or an  
15 extended compliance schedule. Petitioners raised numerous objections to the County's  
16 legislative action, objected to the request to stay compliance proceedings, and asked the  
17 Board to impose invalidity on certain County policies.

18 The Board reviewed the County's legislative action and found it in continuing non-  
19 compliance for several reasons. Amendments in Ordinance 2014-002 did not change  
20 existing regulations found non-compliant by the Board's June 7, 2013, FDO. The existing  
21 regulations continue to apply water quality or quantity controls in **limited areas** of the  
22 County and do not apply measures to protect water quality or quantity throughout the Rural  
23 Area of the County. Further, the County made minor changes to Whatcom County policies  
24 such as changing "ground" water to water "rights" in reference to a Department of Ecology  
25 publication, referencing an existing development code requiring evidence of adequate water  
26 supply, and cross-referencing to a development code regarding land clearing activity in  
27 Water Resource Special Management Areas.<sup>17</sup> None of these actions meet the GMA  
28 requirement to impose measures governing land use and development to protect rural  
29 character by protecting water quality and quantity throughout Whatcom County's Rural  
30 Area. The Board finds the County **in continuing non-compliance**.  
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<sup>17</sup> County Compliance Report (February 28, 2014) Ex. R-165; Ex. A, Chapter 2 Land Use at 1-4.

1 In regard to the County's request for a stay of compliance proceedings, the Board  
2 finds the County has not met the requirements of WAC 242-03-860. This rule requires  
3 parties to file a request for stay within ten days of filing an appeal with a reviewing court.  
4 The County did not meet this requirement. More importantly, the rule provides a stay may  
5 be granted only if delay will not substantially harm the interest of other parties to the  
6 proceeding, for example, when implementation of the non-compliant ordinance has been  
7 halted and no development will vest during pendency of the stay. These criteria are not met  
8 in this case. The Board **denies** the County's request for a stay.  
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10 Alternatively, the County requested an extended compliance schedule pursuant to  
11 RCW 36.70A.300(3)(b) which provides, in part:

12 The board shall specify a reasonable time not in excess of one hundred  
13 eighty days, or such longer period as determined by the board in cases of  
14 unusual scope and complexity, within which the [county] shall comply with  
15 the requirements of this chapter.

16 The Board has previously determined that the issue of measures to protect water resources  
17 in rural areas is a matter of unusual scope and complexity.<sup>18</sup> Accordingly, the Board sets an  
18 extended schedule for the County to come into compliance.  
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20 In regard to the Petitioner's request for invalidity on specific policies, the Board has  
21 previously ruled on this request in its January 10, 2014, Compliance Order. In this order,  
22 the Board once again reiterates it cannot retroactively impose invalidity on regulations that  
23 were not timely appealed nor does imposing invalidity on Policies 2DD-2.C.8 and Policy  
24 2DD-2.C.9 improve the compliance with GMA. Invalidity could in fact reduce protections as  
25 can be seen in Policy 2DD-2. C.9: "Determine adequacy of water supply for building permit  
26 applications proposing to use a well, spring, or surface water, per WCC 24.11.090, .100,  
27 .110, .120, .130, .160, and .170, adopted herein by reference."<sup>19</sup> The effect of imposing  
28 invalidity on this policy would be to eliminate the requirement to determine the adequacy of  
29 water supply. The Board **denies** the request to impose invalidity.  
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<sup>18</sup> See, Certificate of Appealability (Skagit County Superior Court), Case No. 12-2-0013, August 15, 2013.

<sup>19</sup> *Id.* at Ex. 165; Ex. A at 3.

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**VI. ORDER**

Whatcom County is in **continuing non-compliance** with the Growth Management Act as found in the Board's June 7, 2013, FDO. This matter is remanded to the County to take action to comply with the Growth Management Act pursuant to the following schedule. The Board requires the County to file a status report in early October 2014 with compliance action to follow:

Compliance Status Report Due	October 1, 2014
Compliance Due	November 21, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	December 5, 2014
Objections to a Finding of Compliance	December 19, 2014
Response to Objections	December 29, 2014
<b>Compliance Hearing – (Telephonic)</b> Call 1-800-704-9804 and use pin 7579646#	<b>January 6, 2015</b> <b>10:00 a.m.</b>

DATED this 15<sup>th</sup> day of April, 2014.

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Nina Carter, Board Member

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Raymond L. Paoella, Board Member

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Margaret Pageler, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>20</sup>**

<sup>20</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.